Supreme Court, U.S.
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No. 96-1038

In The

Supreme Court of the United States

October Term, 1996

HERBERT L. FISCHER, *et al.*,

Petitioners,

v.

PHILADELPHIA ELECTRIC COMPANY, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondents in this matter are PECO Energy Company, formerly known as Philadelphia Electric Company, Joseph F. Paquette, Jr., Michael J. Crommie and Service Annuity Plan of Philadelphia Electric Company.

Respondents have no parent companies or non-wholly owned subsidiaries to list pursuant to Rule 29.6.

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BRIEF IN OPPOSITION

Respondents PECO Energy Company, *et al.*, (collectively, "PECO") respectfully pray that the petition for writ of certiorari sought in this matter be denied.

STATEMENT OF THE CASE

PECO respectfully refers this Court to the Third Circuit's opinion, *Fischer* v. *Philadelphia Elec. Co.*, 96 F.3d 1533, 1536-38 (1996); App. to Pet. for Cert. 5a-8a, for a complete statement of the relevant facts and procedural history. As explained herein, the petition fails to advance any compelling reason for granting certiorari. Moreover, even if the Court were inclined to resolve the question presented, this case does not present an appropriate vehicle because no resolution of the question presented would produce a recovery for the petitioners.

A. Background

The case arises out of an announcement in April 1990 by Joseph Paquette, Jr., the president of PECO, that the company would seek to reduce its payroll through an early retirement incentive program that included pension "sweeteners." 96 F.3d at 1536; App. to Pet. for Cert. 5a-6a. Petitioners – former employees of PECO who had voluntarily retired from the company between January 1 and April 1 of 1990, *see* 96 F.3d at 1543 n.4; App. to Pet. for Cert. 18a n.4 – would have been eligible to elect enhanced pension benefits if they had remained employed when the offer became effective.

Disappointed that they retired before PECO decided to offer the early retirement incentive program, petitioners brought suit alleging that the company breached a fiduciary obligation owed under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq.*, by making material misrepresentations. 96 F.3d at 1536; App. to Pet. for Cert. 6a. Specifically, petitioners claimed that PECO had a duty to disclose that it was considering an early retirement plan at a time in late 1989 and early 1990 when petitioners were deciding whether to retire. Pet. for Cert. 7 n.2.

Initially, the district court entered summary judgment in PECO's favor. 96 F.3d at 1536; App. to Pet. for Cert. 5a. The Third Circuit reversed, holding that PECO could be liable for a breach of fiduciary duty if the company had represented that no early retirement plan was being considered at a time when the plan was in fact under serious consideration. *Fischer* v. *Philadelphia Elec. Co.*, 994 F.2d 130, *cert. denied*, 510 U.S. 1020 (1993); App. to Pet. for Cert. 57a. On remand, the district court focused primarily on the question of when PECO began to give serious consideration to the plan. 96 F.3d at 1536; App. to Pet. for Cert. 5a. If serious consideration did not occur until after April 1, 1990, then PECO did not make any misrepresentations to any plaintiff considering retirement, and PECO would be entitled to judgment on the merits.

The district court defined serious consideration as the time when a specific proposal was being discussed for purposes of implementation by senior management with the authority to implement the change. App. to Pet. for Cert. 37a. Notwithstanding that definition, the district

court held that serious consideration in this case began on March 12, 1990, the date that a PECO benefits manager discussed preliminary considerations about early retirement options with an outside consultant. *Id.* at 38a-39a.

On appeal, PECO argued that the district court's finding on that point was clearly erroneous under the district court's own definition of serious consideration. PECO further argued that the three elements of serious consideration were not satisfied before April 1990. The Third Circuit agreed, concluding, based on the district court's underlying factual findings, that serious consideration began on April 7, 1990, when senior PECO management met to discuss a report containing specific proposals for staff reduction options as part of a hundred-million-dollar reduction in operating costs. 96 F.3d at 1541-42; App. to Pet. for Cert. 16a-18a. Because the Third Circuit concluded that PECO had not given serious consideration to the early retirement plan until after petitioners retired, it directed the entry of judgment in PECO's favor. 96 F.3d at 1544; App. to Pet. for Cert. 24a.

B. Objections To Petitioners' Statement Of The Case

Petitioners' statement of the case is rife with argument, speculation and assertions of "fact" that were never found (and, in some instances, not even made part of the record) in the courts below.

For example, petitioners correctly note that Paquette announced to employees in December 1989 that "an early retirement program might be implemented if PECO decided to reduce its work force." Pet. for Cert. 6. In an

attempt to show that this statement was somehow a material misrepresentation, the petition misleadingly asserts that Paquette "had to realize by this time that it was only a question of four months time as to *when, not if,* an early retirement incentive would be recommended." *Id.*

Aside from the blatantly speculative nature of this assertion, the petition blithely ignores that both the trial court and the court of appeals rejected this precise factual contention:

> The district court was equally correct to dispose of Paquette's statements during his speeches to employees on December 13, 1989. Paquette responded truthfully to employee questions regarding PECO's potential responses to an adverse decision in the rates case. Paquette explained that PECO would first appeal the decision but might also have to consider cutting costs by reducing its stock dividend or other methods. *This is the type of frank response to employee concerns that should be encouraged. Paquette's statements will not support an inference that an early retirement plan was then under serious consideration.*

96 F.3d at 1541-42; App. to Pet. for Cert. 16a (emphasis added). A number of similar examples could be cited to show petitioners' main contention is simply that the Third Circuit misapplied the concept of serious consideration by refusing to adopt petitioners' characterization of the underlying facts. This Court's Rules make clear that an alleged misapplication of a properly stated rule of law rarely will justify review. *See* Sup. Ct. R. 10.

The petition also misstates a significant aspect of the Third Circuit's decision, claiming that the court "developed a new definition of serious consideration." Pet. for Cert. 12. In actuality, as noted in the Third Circuit's opinion, the court's three-part definition of serious consideration was drawn from the district court's definition of serious consideration in this case and from identical language in other cases applying the same standard. 96 F.3d at 1539; App. to Pet. for Cert. 12a. Here, the Third Circuit concluded that the district court's finding that serious consideration began on March 12, 1990 was *clearly erroneous*. 96 F.3d at 1541 n.3; App. to Pet. for Cert. 15a n.3.

Nor does the Third Circuit's ruling in this case create an intercircuit conflict. The Third Circuit plainly stated that it has yet to resolve conclusively whether a determination of serious consideration should be classified as a finding of fact or a conclusion of law. *Id.* Thus, the Third Circuit cannot be said to have ruled in a manner that conflicts with rulings from other courts of appeals that a determination of serious consideration constitutes a finding of fact. Moreover, the Third Circuit's decision in this case makes clear that petitioners could not recover even if this Court ruled that a determination of serious consideration constitutes a finding of fact. *Id.*

ARGUMENT

As the Court of last resort exercising discretionary review, this Court accepts cases only when there are "compelling reasons" to grant review. Sup. Ct. R. 10. No compelling reasons exist here. The petition reveals that

the question presented is factbound. Moreover, no split of authority whose resolution would benefit petitioners exists among the United States Courts of Appeals. Finally, the Third Circuit's opinion below makes clear that the court of appeals would reach the same result regardless of whether a determination of "serious consideration" were classified as a finding of fact or a conclusion of law.

I. This Case Presents No Opportunity For The Court To Consider Supposedly Unsettled Questions Of Federal Law

Petitioners' first argument is that this case presents an important but unsettled question of federal law on which the Court's guidance is required. Pet. for Cert. 16-17. The petition itself acknowledges, however, that every court of appeals to have considered the question of an employer's duty to disclose pension changes has determined that, where such a duty exists, it arises when the possible change is under serious consideration.[1] Pet. for Cert. 17. Petitioners fail to explain why this Court's guidance is required on an issue as to which the courts of appeals apply essentially the same test.

Moreover, the only arguably alternate approach to the issue that has been adopted by a court of appeals holds that an employer has *no affirmative duty* to disclose

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[1] *See Mullins* v. *Pfizer, Inc.*, 23 F.3d 663, 669 (CA2 1994); *Berlin* v. *Michigan Bell Tel. Co.*, 858 F.2d 1154, 1163 (CA6 1988); *Wilson* v. *Southwestern Bell Tel. Co.*, 55 F.3d 399, 405 (CA8 1995); *Maez* v. *Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1500-01 (CA10 1995); *Barnes* v. *Lacy*, 927 F.2d 539, 544 (CA11), *cert. denied*, 502 U.S. 938 (1991).

its consideration of a pension change until the change is formally adopted. *See Pocchia* v. *NYNEX Corp.*, 81 F.3d 275, 278 (CA2), *cert. denied*, 117 S. Ct. 302 (1996). Certainly, petitioners cannot be seeking from this Court adoption of that rule. Yet petitioners do not offer any definition of serious consideration other than that followed by the Third Circuit, nor do they cite any other case that would require reversal of the Third Circuit's ruling.

Instead, petitioners appear to argue that the Third Circuit should have left the concept of "serious consideration" undefined and should have affirmed as a finding of fact the district court's determination of when serious consideration existed. Pet. for Cert. 17. This case does not present an appropriate record for this Court to address petitioners' argument, however, because the Third Circuit "expressly reserve[d] the question of the appropriate standard of review" and "would reverse the district court even on the clearly erroneous standard." 96 F.3d at 1541 n.3; App. to Pet. for Cert. 15a n.3.

Petitioners' contention that the Third Circuit erred in failing to leave the concept of "serious consideration" undefined is also without merit. As the Third Circuit noted, its formulation of the test for serious consideration:

> respects the division of responsibility in corporate entities and the day-to-day realities of running a business. Even more importantly, it protects the right of employees to material information. Characterizing serious consideration in this fashion ensures that disclosures to employees about potential changes in benefits will be meaningful.

96 F.3d at 1540-41; App. to Pet for Cert. 14a. In short, the court of appeals has provided needed guidance to employers, employees and the district courts within the Third Circuit on the issue of serious consideration. The petition offers no reason why that helpful guidance should be withdrawn.

No court has adopted a definition of serious consideration that would require employers to disclose every conversation that every benefits manager has with every outside consultant in which the possibility of a pension change is discussed. Yet the only way these petitioners can prevail would be for this Court to adopt that expansive and absurd definition of "serious" consideration.

II. The Third Circuit's Decision Does Not Conflict With Any Decision Of This Court Regarding A Fiduciary's Duties Under ERISA

PECO and petitioners are in agreement that a plan fiduciary cannot affirmatively mislead plan participants about plan benefits. Pet. for Cert. 20. The Third Circuit did not rule to the contrary. 96 F.3d at 1538; App. to Pet. for Cert. 9a ("Put simply, when a plan administrator speaks, it must speak truthfully.") (internal quotations omitted). Petitioners' suggestion that the Third Circuit condones materially misleading communications is specious; the Third Circuit specifically concluded that PECO *did not mislead* petitioners because PECO was not giving serious consideration to the early retirement plan until April 1990. 96 F.3d at 1542; App. to Pet. for Cert. 18a.

Nevertheless, petitioners assert that under the Third Circuit's decision in this case, a company could "effectively engage in such [allegedly misleading] conduct" by having mid-level managers develop early retirement plans without disclosing the company's consideration of the plan to employees. Pet. for Cert. 20. That hypothetical situation merely demonstrates the distinction between *some* consideration and *serious* consideration; the duty to disclose only arises when changes are being seriously considered by those authorized to effect a change. Nothing in the Third Circuit's ruling is inconsistent with this Court's decision in *Varity Corp.* v. *Howe*, 116 S. Ct. 1065 (1996), or with any other decision of this Court.

III. The Circuit Conflict Alleged In The Petition Is Illusory

Finally, the petition asserts that the decision in this case conflicts with decisions in other circuits where "no restrictive three prong test or other definition is imposed upon the trier of fact." Pet. for Cert. 21. To the contrary, the Third Circuit cited with approval and followed those rulings of other courts of appeals that are alleged to give rise to a conflict. 96 F.3d at 1538-39; App. to Pet. for Cert. 10a, 12a.

It may be true that the Third Circuit is the first court of appeals to provide a detailed explanation of what "serious consideration" entails. However, the fact that one circuit has defined a legal standard more precisely than other circuits applying the same standard does not mean that similar circumstances would yield differing results in the various circuits.

Petitioners have failed to argue, and cannot show, that they would have prevailed on appeal had their case been decided under the law of any other circuit. If a circuit conflict of consequence to petitioners truly existed, petitioners should have been able to make such a showing. In the absence of such a showing, this Court should reject petitioners' allegation of an intercircuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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